LIAN MONG YEE

v.

USAHA SAMA TIMUR BARAT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[WINDING-UP NO: D2-28-305-97]
20 FEBRUARY 1998

COMPANY LAW: *Winding-up - Petition - Affidavits in reply to affidavits in opposition - Extension of time to file, application for - Discretion of court - Prejudice - Companies (Winding-up) Rules 1972, rr. 30(2) & 193*

A winding-up petition was filed by the petitioner and served on the respondent on 11 September 1997. The hearing was fixed for 14 November 1997. The respondent filed and served its affidavit in opposition on 7 November 1997 pursuant to r. 30(1) of the Companies (Winding-up) Rules 1972 ('the Rules'). As the affidavit in opposition, *inter alia*, questioned the validity of the petition, the petitioner intended to file an affidavit in reply but by r. 30(2) of the Rules was required to do so by 11 November 1997. On the date of the hearing, the petitioner applied for a postponement for this purpose and also because the registrar's certificate had not been obtained as required under r. 32 of the Rules. The court allowed the postponement on the basis that r. 32 of the Rules had not been complied with and fixed the next hearing date for 15 May 1998.

On 31 December 1997, the petitioner filed an application for extension of time to file the affidavit in reply. The reason given for not being able to file the affidavit by 11 November 1997 was that the petitioner had been outstation and had only returned on 10 November 1997. Counsel for the respondent objected stating that the petitioner's counsel should have advised him to keep himself available in case the respondent's affidavit in opposition was filed and further, that the petitioner should have filed the application for extension before 14 November 1997 and should not have left it until a month and a half later.

The issue was whether the court ought to exercise its discretion to allow the petitioner to file his affidavit in reply out of time.

Held:

[1] It is clear that although r. 30(2) of the Rules states the time-limit in mandatory terms, as generally do all rules fixing time within which a person is allowed or required to do something, r. 193 empowers the court to extend time.

[2] There was no evidence that the petitioner had been told to keep himself available. If he had not been so told, it would have been the failing of his solicitors and the petitioner should not suffer for the default of his solicitors. It also was not suggested that the petitioner had gone and remained outstation otherwise than innocently. Therefore, it was not reasonable to reject his being outstation as an excuse for his failure to file the affidavit in time.

[3] On the question of delay, the hearing of the petition having been postponed to 15 May 1998, there would be no prejudice to the respondent to allow the plaintiff an extension of time within which to file the affidavit in reply even though the application had been delayed for a month and a half.

[Application allowed.]

Case referred to:
Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff Mohamed [1997] 3 CLJ 332 ***(dist)***

Legislation referred to:
Companies (Winding-up) Rules 1972, rr. 30(1), (2), 32, 193
Legal Profession Act 1976, s. 15(5)

For the petitioner - Jaswinder Singh; M/s Megat Najmuddin Leong & Co
For the respondent - Saranjit Singh; M/s KS Narayanan & Assoc

Reported by Cindy Chan

JUDGMENT

Abdul Aziz Mohamad J:

The winding-up petition in this case was filed on 5 August 1997 grounded on the non-payment of the sum of RM28,295,998.20 payable under a consent order. It was served on the respondent company on 11 September 1997, giving 14 November 1997 as the hearing date. By r. 30(1) of the Companies (Winding-up) Rules 1972, the affidavit in opposition of the respondents should have been filed and served the latest on 7 November 1997. It was in fact filed and served on that day, the last day.

The affidavit in opposition raised various matters. It sought to impugn the service of the statutory notice. It questioned the validity and enforceability of the consent order. There were averments about service, the consent order, and other things, which the petitioner should seriously consider and reply to.

By r. 30(2) of the said Rules, the petitioner's affidavit in reply should have been filed and served before 11 November 1997.

When the petition came up for hearing on 14 November 1997, counsel for the petitioner applied for a postponement to enable the petitioner to file his affidavit in reply, which had not yet been filed, and also because the registrar's certificate of satisfaction under r. 32 had not been obtained. After hearing argument, I allowed a postponement for the reason that the registrar's certificate had not been obtained, holding that the failure of the petitioner to take the necessary steps to obtain it had not been such as to merit refusal of an adjournment. The hearing was postponed to 15 May 1998.

On 31 December 1997 the petitioner filed the present application for extension of time to file his affidavit in reply, which had by then been prepared and was exhibited to the affidavit in support of the application. It gave impressive replies to the matters raised in the respondents' affidavit in opposition.

It is clear that although r. 30(2) states the time-limit in mandatory terms, as generally do all rules fixing a time within which a person is allowed or required to do something, r. 193 empowers the court to extend the time. The decision of the Supreme Court in *Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff bin Mohamed* [1997] 2 MLJ 271, relied upon by learned counsel for the respondents, was about the time prescribed by s. 15(5) of the Legal Profession Act 1976 and the reasoning of the Supreme Court in that case must, I think, be taken as confined to the question whether Parliament intended that the period prescribed by that section might be abridged. In the case of the Winding-up Rules, it is clear from r. 193 that it is intended that any time appointed by the Rules can be extended.

The question that requires to be answered now, therefore, is whether I ought to exercise my discretion to allow the petitioner to file his affidavit in reply out of time.

The reason given by the petitioner for not being able to file his affidavit in reply within three days of 7 November 1997 is that he had been outstation and had only returned from Johor on Monday, 10 November. He does not say when and for what reason it was that he had gone outstation.

Learned counsel for the respondents argued that the petitioner's counsel would or should have told the petitioner to stick around and be in readiness to reply in case the respondents should; at the eleventh hour, file their affidavit in opposition.

There is of course no evidence that the petitioner had been so told. So he cannot be put at fault on the ground that he had been so told. If he had not been so told, it would have been a failing of his solicitors, but I do not consider that the petitioner should suffer for the default of his solicitors. I accept the fact that he was outstation and that, because of that, it was not possible for his affidavit in reply to be prepared within three days of 7 November. It has not been suggested that he had gone and remained outstation otherwise than innocently, in order to avoid filing his affidavit in time. I do not think it is reasonable to reject his being outstation as an excuse for his failure to file his affidavit in time, on the basis that he ought not to have gone outstation.

Then there is the question of the delay in applying for the extension of time. It was argued by counsel for the respondents that the petitioner should have filed this application before 14 November 1997, the original hearing date, and should not have left it until about a month and a half later.

I would judge the delay primarily by any possible prejudice it may bring to the respondents. Had the petitioner applied for extension before 14 November 1997, the hearing on that day would have been postponed all the same to 15 May 1998 to enable the extension application to be disposed of first, as it was in fact postponed for the reason that the registrar's certificate of satisfaction had not yet been obtained. The hearing of the petition having been postponed to 15 May, there will be no prejudice to the respondents to allow the plaintiff an extension of time within which to file his affidavit in reply even though the application for it had been delayed for a month and a half. The proposed reply of the plaintiff merits serious consideration and it would not be just to deprive him of the opportunity to put it in when it would not prejudice the respondents in regard to the speediness of the disposal of the petition against them.

I would allow the extension of time sought by the plaintiff.